

1 THE HONORABLE JAMES P. DONOHUE
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13 UNITED STATES DISTRICT COURT
14 WESTERN DISTRICT OF WASHINGTON
15 AT SEATTLE

16 ZANGO, INC.,

17 Plaintiff,

18 No. CV-07-0797 JPD

19 v.

20 PLAINTIFF ZANGO'S MOTION FOR
21 TEMPORARY RESTRAINING ORDER

22 PC TOOLS PTY, LTD.,

23 Defendant.

24 **I. RELIEF REQUESTED**

25 Plaintiff Zango, Inc. ("Zango") is a Bellevue-based company that provides content to
26 its customers via the Internet. On May 11, 2007, Zango learned that a scanning application
27 ("Spyware Doctor") distributed by defendant PC Tools Pty Ltd. ("PC Tools") was
28 systematically eliminating Zango's software and products from the computers of millions of
29 users. Spyware Doctor provides the computer user with no specific warning that Zango's
30 software application would be deleted; instead, Zango's software simply vanished from the
31 user's computer, leaving Zango with no means of contacting or communicating with its
32 customers.

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34 PLAINTIFF ZANGO'S MOTION FOR TEMPORARY
35 RESTRAINING ORDER – Page 1
36 No. CV-07-0797 JPD

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43 ORIGINAL

1 Spyware Doctor's extensive, ongoing and irreversible attack on Zango warrants
 2 immediate injunctive relief. Here are just a few of the irreparable consequences Zango will
 3 continue to suffer absent injunctive relief:

- 4 • Zango customers who install Spyware Doctor version 5.0.184 ("SD 184")
 5 receive no explicit notice that the Spyware Doctor program is irrevocably
 6 removing Zango products from their computers. Accordingly, when these
 7 customers are unable to access their Zango programs after the installation of
 8 Spyware Doctor, they unfairly (but understandably) blame Zango for the
 9 programs' disappearance. As a result, PC Tools' product is causing Zango to
 10 lose existing customers (and their goodwill) on daily basis.
- 11 • Because Zango does not collect personal identifying information from its
 12 customers, customers that Zango loses due to PC Tools' attack are lost forever;
 13 similarly, Zango has no means of contacting its customers and warning them of
 14 the attack. For this reason, PC Tools is not just irrevocably erasing Zango
 15 products from users' computers, it is also irrevocably erasing hard-earned
 16 customers from the rolls of Zango's customer lists.
- 17 • Spyware Doctor 184 also causes Zango to lose future customers. Once
 18 installed, the Spyware Doctor program prevents the future installation of
 19 Zango products, which means that Zango is forever prevented from reaching
 20 these potential customers.

21 There is no justification for Spyware Doctor's attack on Zango's products. Richard
 22 Purcell – a world-renowned independent computer privacy expert – has conducted an
 23 exhaustive review of Zango's products and policies and pronounced them to be benign. *See*
 24 Declaration of Richard Purcell (hereinafter "Purcell Decl."). Indeed, PC Tools itself has
 admitted that Zango's products are "not malicious." *See* Exhibit A (e-mail communication of
 March 28, 2007 from director of PC Tools' Malware Research Centre) to Declaration of
 Gregg Berretta (hereinafter "Berretta Decl.").

25 Given these uncontested facts, there is no question that Zango will prevail in the
 26 claims set forth in the Complaint it quickly filed after learning of PC Tools' misconduct.
 27 Indeed, just one day after Zango filed its Complaint (and one day before a scheduled TRO
 28 hearing), an attorney for PC Tools contacted an attorney for Zango, agreed that PC Tools was

1 incorrectly classifying Zango's products and assured Zango that PC Tools would solve the
 2 problem as soon as possible. Based on these assurances, Zango agreed to postpone the
 3 scheduled TRO hearing.

4 PC Tool's assurances have so far proved illusory and Zango can afford to wait no
 5 longer for the relief PC Tools has promised. As a result of Spyware Doctor's widespread
 6 distribution via Google, Zango is suffering massive irreparable harm to its business model and
 7 reputation *right now*, and without quick intervention by this Court, Zango will continue to
 8 suffer irreversible harm that will never adequately be compensated at law. Accordingly,
 9 Zango seeks a temporary restraining order, and, ultimately, a preliminary injunction,
 10 compelling PC Tools to immediately remove Zango's software programs from the Spyware
 11 Doctor detection database.

12 II. STATEMENT OF FACTS

13 Zango is an online media company based in Bellevue, Washington that provides
 14 consumers free access to a large catalog of online videos, games, music, tools and utilities.
 15 Zango's catalog of content is offered to customers free of charge and is sponsored by
 16 advertising that customers agree to view as a condition of using the products. Zango also
 17 offers a premium version of its software that gives consumers access to Zango's content
 18 catalog without advertising.

19 Zango takes extensive precautions to ensure that every Zango customer affirmatively
 20 and knowingly consents to download, installation and continued usage of Zango software. An
 21 independent audit conducted by Richard Purcell, CEO of Corporate Privacy Group, released
 22 on May 7, 2007, concluded that Zango is fully compliant with all reasonable and
 23 recommended privacy requirements, and, in particular that Zango's privacy program ensures:
 24 (1) user notification of the program or application's existence; (2) user consent to the

1 download or installation of the program or application; and (3) user control of the program or
 2 application. *See Purcell Decl.*, Ex. B. As a result of Zango's commitment to protecting the
 3 privacy of its customers, Zango can be certain, and Mr. Purcell has verified, that all users who
 4 have installed Zango's applications or products since January 1, 2006 have done so
 5 consensually.

6 PC Tools is in the business of developing and marketing various computer protection
 7 and security software programs. One such program is "Spyware Doctor." On or about March
 8 29, 2007, Google, Inc. began including a version of Spyware Doctor called "Spyware Doctor
 9 Starter Edition" (hereinafter, "Starter Edition") in its "Google Pack" software package. Given
 10 Google's massive Internet presence, the number of consumers who have downloaded and
 11 installed Starter Edition since March 29 likely reaches into the millions.

12 On May 11, 2007, Zango learned that Starter Edition is disabling Zango installations
 13 to the point that existing, consensually installed Zango software already resident on a
 14 consumer's computer no longer functions. Further testing revealed that while the Starter
 15 Edition software prevents the display of advertisements from Zango on behalf of Zango's
 16 advertising partners (which is the primary source of Zango revenue), some existing Zango
 17 customers nonetheless are still able to access the content in Zango's catalog (i.e., the movies,
 18 games, screensavers, and the like). Starter Edition software damages the Zango application
 19 immediately upon installation, without giving any specific notice whatsoever to Zango
 20 customers or providing any opportunity for Zango customers to consent or intervene.

21 These actions stand in stark contrast to the treatment Zango's products received from
 22 security software application "Ad-Aware SE" (hereinafter "Ad-Aware"), which was formerly
 23 offered as part of the "Google Pack," and which Spyware Doctor replaced. Ad-Aware is
 24 manufactured and distributed by a company called Lavasoft AB, which is not a party to this

1 action. Unlike Spyware Doctor, the only action Ad-Aware took with respect to Zango's
 2 applications was to notify users upon installation that Zango products will make a change to
 3 the user's Windows registry. Ad-Aware provided an identical warning to users upon
 4 installation of all non-malicious software, including such popular downloadable applications
 5 as the Google or Yahoo! toolbars.

6 Crucially, Ad-Aware provided users with an opportunity to choose whether to take
 7 any action with respect to Zango products or whether to allow Zango products to remain
 8 installed on the user's computer. Zango customers who install Spyware Doctor 184 are given
 9 no such notice. Immediately upon installation, Spyware Doctor damages and destroys
 10 Zango's applications. The fact that Zango's customers are unable to intervene in this process
 11 is attested to by the emails Zango has received from customers complaining that Spyware
 12 Doctor disabled their Zango products. *See* Berretta Decl., Ex. B.

13 Internal testing of Starter Edition by Zango also showed that, after a brief period of
 14 time following the initial disabling of Zango's software, Starter Edition repeatedly delivers a
 15 specific type of message format (sometimes called a "toaster") on the user's screen stating
 16 "Malicious Action Blocked" and identifying Zango's software as an "Elevated Risk." As PC
 17 Tools well knows, and has admitted, characterization of Zango's products in this manner is
 18 not accurate. In an email communication sent March 28, 2007, Jim Meem, the director of PC
 19 Tools' Malware Research Centre, stated that "[w]e [PC Tools] have concluded that Seekmo
 20 [one of the four essentially identical Zango software brands] *is not malicious.*" (Emphasis
 21 added.) Berretta Decl., Ex. A. Yet this is precisely how Spyware Doctor, PC Tools' flagship
 22 product, chooses to label Zango products to Zango customers.

23 Finally, testing has also shown that consumers who have Starter Edition already
 24 installed on their computers are unable to install Zango's software, thereby eliminating Starter

1 Edition users as potential customers of Zango's software. Again, Starter Edition provides no
 2 opportunity for users who wish to download and install Zango's software to override Starter
 3 Edition and do so.

4 Zango has suffered significant damage to its reputation, customer base and business
 5 model as a result of the actions of the PC Tools software described above. A revenue analysis
 6 performed by Zango's Director of Finance shows an abrupt change from positive revenue
 7 momentum to sharp negative revenue momentum taking place on approximately April 1, i.e.,
 8 coinciding with Starter Edition's inclusion in Google Pack. *See* Declaration of Tom Allan
 9 (hereinafter "Allan Decl."), Exhibit A. In addition to the damage inflicted by severing
 10 Zango's relationships with existing and contemplated customers, PC Tools' actions are likely
 11 to have a chilling effect on Zango's ability to partner with new content providers and
 12 distribution channels, thereby disrupting Zango's business model. Moreover, being labeled
 13 "malicious" by an anti-spyware application damages Zango's reputation in the marketplace, a
 14 reputation that Zango has worked hard to achieve.

15 Beginning on May 11, Zango repeatedly contacted senior PC Tools' employees,
 16 including its CEO, General Counsel, and the Head of its Malware Research Centre, to request
 17 the removal of Zango products from the Starter Edition detection database. Complying with
 18 this request would not be onerous for PC Tools, as detection databases are typically updated
 19 hourly. Berretta Decl. ¶¶ 14, 15. Nor would removing Zango products from the detection
 20 database negatively impact PC Tools customer base or potential future customers seeking
 21 protection from spyware, as all Zango users have consensually downloaded Zango's software.
 22 PC Tools ignored Zango's requests.

23 After PC Tools refused to remove Zango products from its detection database, Zango
 24 filed a complaint in King County Superior Court on May 15, 2007. On May 16, 2007, Zango

gave PC Tools notice that it planned to seek a TRO on May 17, 2007. In a bid to delay the scheduled TRO hearing, PC Tools assured Zango that it would reclassify and modify its software to eliminate the harm Zango was incurring (and continues to incur). Based on these assurances, Zango agreed to delay the hearing.

PC Tools' assurances notwithstanding, Zango continues to be harmed, as the version of Spyware Doctor that is on the Google website continues to damage and delete Zango products without user consent. Equally important, Zango continues to suffer irreparable harm from earlier versions of Spyware Doctor.

In the last week, Zango has repeatedly complained about PC Tools' failure to modify its products and the irreparable damage it suffers every day from the version of SD that remains on the Google Pack web site. Accordingly, on Tuesday, May 22, Zango gave PC Tools notice of its intent to seek a TRO from the ex parte department of the King County Superior Court the next day. After receiving notice of the May 23 hearing, PC Tools' attorney represented that PC Tools shipped a modified version of Spyware Doctor to Google on May 23. Nevertheless, although PC Tools has apparently made updated versions of Spyware Doctor available to other clients, as of the current date and time, SD 184 remains on the Google Pack website. On May 24, 2007, PC Tools removed this case to this Court.

III. STATEMENT OF ISSUES

Whether the Court should enter a temporary restraining order and preliminary injunction compelling defendant PC Tools to remove Zango's software programs from the Spyware Doctor detection database.

IV. EVIDENCE RELIED UPON

Zango relies upon the Declarations of Robert Purcell, Gregg Berretta, Tom Allan and the exhibits attached therein.

V. AUTHORITY

A. Legal Standard

In determining whether to issue a temporary restraining order or preliminary injunction, federal courts in the Ninth Circuit consider: (1) the likelihood of success on the merits, (2) the possibility that the plaintiff will suffer irreparable injury without injunctive relief, (3) the extent to which the “balance of hardships” favors the plaintiff, and (4) whether injunctive relief would advance the public interest (in certain cases). *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980); *Del Toro-Chacon v. Chertoff*, 431 F. Supp. 2d 1135, 1140 (W.D. Wash. 2006). See also *Citizens Alliance to Protect our Wetlands v. Wynn*, 908 F. Supp. 825, 829 (W.D. Wash. 1995) (the standard for preliminary injunctions also applies to temporary restraining orders). “The analysis is often compressed into a single continuum where the required showing of merit varies inversely with the showing of irreparable harm.” *Del Toro-Chacon*, 431 F. Supp. 2d at 1140. Therefore, the movant may satisfy its burden “by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor.” *Los Angeles Mem'l Coliseum*, 634 F.2d at 1201. As will be demonstrated, Zango satisfies these requirements.

B. Zango is Likely to Succeed on the Merits.

Zango's first cause of action against PC Tools, intentional interference with Zango's contractual relations or business expectancy, requires the following elements:

(1) the existence of a valid contractual relationship or business expectancy; (2) that the defendant had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendant interfered for an improper purpose or used improper means; and (5) resultant damage.

1 *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997)
 2 (internal citations omitted).¹

3 The likelihood that Zango will prevail on this cause of action is overwhelming. Zango
 4 has a valid contractual relationship with its existing customers and a valid business
 5 expectancy in future customers of Zango products. *See Newton Ins. Agency & Brokerage,*
 6 *Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158, 52 P.3d 30 (2002) (“A valid
 7 business expectancy includes any prospective contractual or business relationship that would
 8 be of pecuniary value.”). PC Tools clearly had knowledge of the relationship between Zango
 9 and its customers as well as Zango’s prospective business prospects and equally clearly
 10 purposefully interfered with those relations and prospects by disabling Zango’s software and
 11 by preventing any future customers from being able to install Zango software. *See id.*
 12 (“Interference with a business expectancy is intentional ‘if the actor desires to bring it about
 13 or if he knows that the interference is certain or substantially certain to occur as a result of his
 14 action.’”) (quoting Restatement (Second) of Torts § 766B cmt. d). Moreover, PC Tools
 15 interfered for an improper purpose – advancement of its own commercial interests at Zango’s
 16 expense – and its bad faith is evident by its continuing refusal to remedy the ongoing damage
 17 being inflicted on Zango. Finally, the resultant damage to Zango is self-evident: PC Tools’
 18 actions have caused and continue to cause substantial financial damage by severing the
 19 relationship between Zango and its current and potential future customers (in addition to the
 20 damage Zango is suffering to its reputation and business model).

21 Zango is very likely to prevail on its second cause of action against PC Tools as well.
 22 Liability for trade libel attaches where a defendant: (1) publishes false and disparaging

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 24 ¹ Federal courts apply state tort law in diversity cases. *Estate of Domingo v. Republic of*
Philippines, 694 F. Supp. 782, 785 (W.D. Wash. 1988).

1 statements concerning the quality of the plaintiff's product; (2) does so with the intent that
 2 such publication results in harm to the pecuniary interest of the plaintiff, or either recognizes
 3 or should recognize that such harm is likely; and (3) does so with actual malice (i.e., either
 4 knows that the statement is false or acts in reckless disregard of its truth or falsity).

5 Restatement (Second) of Torts § 623A; *see also Auvil v. CBS "60 Minutes"*, 67 F.3d 816, 820
 6 (9th Cir. 1995) (assuming that Washington recognizes trade libel based on Washington Court
 7 of Appeals decision citing Restatement § 623A for the proposition that plaintiffs seeking
 8 damages in disparagement face a higher burden of proof than those seeking damages in
 9 defamation). Here, PC Tools has labeled, and continues to label, Zango's products as an
 10 "infection," as "malicious" and as an "elevated risk." Labeling Zango products in this manner
 11 is likely to mislead existing customers into believing that Zango applications are damaging
 12 their computers or somehow compromising their privacy, which, as PC Tools knows, is not
 13 the case. Future customers who are blocked from downloading Zango products are likely to
 14 reach the same conclusion. Zango has worked hard to achieve a good reputation in the
 15 marketplace, and to foster relationships with customers, content-providers, and distribution
 16 channels. Spyware Doctor's baseless and, yes, malicious, attacks on Zango's products
 17 threaten all that Zango has worked to achieve.

18 Zango will likewise be able to establish its cause of action under the Washington
 19 Consumer Protection Act ("CPA"). A plaintiff makes a *prima facie* showing of a CPA
 20 violation when it shows (1) an unfair or deceptive act; (2) in trade or commerce; (3) impacting
 21 the public interest; (4) injuring Plaintiff in its business or property; and (5) causation.
 22 *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531
 23 (1986). PC Tools specifically markets itself as a purveyor of security software that protects
 24 consumers from so-called "spyware." PC Tool's unfair and deceptive conduct thus has a

1 public interest impact, and the conduct clearly injured and will continue to injure Plaintiff's
 2 business, reputation, and goodwill.

3 **C. PC Tools' Conduct Has Caused, and Will Continue to Cause, Irreparable Injury
 4 to Zango.**

5 Courts routinely recognize that significant loss of customers or business goodwill and
 6 damage to business reputation may constitute substantial or irreparable harm justifying
 7 injunctive relief. *See, e.g., Multi-Channel TV Cable Co. v. Charlottesville Quality Cable
 8 Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) ("[W]hen the failure to grant preliminary
 9 relief creates the possibility of permanent loss of customers to a competitor or the loss of
 10 goodwill, the irreparable injury prong is satisfied."); *K-Mart Corp. v. Oriental Plaza, Inc.*,
 11 875 F.2d 907, 915 (1st Cir. 1989) ("[H]arm to goodwill, like harm to reputation, is the type of
 12 harm not readily measurable or fully compensable in damages -- and for that reason, more
 13 likely to be found 'irreparable.'"); *Ginorio v. Gomez*, 301 F. Supp. 2d 122, 134 (D.P.R. 2004)
 14 (plaintiffs sought an injunction to stop the defendant from revoking their insurance licenses;
 15 court found that plaintiff had established irreparable injury where evidence showed that the
 16 "the insurance business is one based on trust and . . . the revocation of plaintiffs licenses, even
 17 if temporary, would result in unmeasurable harm to plaintiffs' reputation[,]"; and that plaintiffs
 18 "existing clients and any potential new ones would have to take their business elsewhere.").

19 Here, as a result of PC Tools' conduct, Zango has suffered damages to its customer
 20 base, its reputation, and its business model. In addition to the direct financial damages being
 21 inflicted by PC Tools, Zango faces the ongoing prospect of permanent loss of customers to
 22 competitors in the marketplace, loss of goodwill, and damage to its reputation. These are not
 23 losses that are easily recouped or which may be cured solely by recovery of money damages.
 24

1 **D. The Balance of Hardships Tips in Zango's Favor.**

2 The balance of hardships favors relief to Zango. Zango will suffer—in fact, it is
 3 already suffering—incalculable harm if the temporary restraining order is not granted. Day
 4 by day, Zango is losing its customers and suffering damage to its goodwill and reputation.
 5 Conversely, the relief requested by Zango asks very little of PC Tools, and would have no
 6 effect on its existing customer base or future customers. Given the significant ongoing
 7 damages being suffered by Zango, and the ease with which PC Tools may remedy the
 8 situation, balancing of the equities favors granting the present motion.

10 **VI. CONCLUSION**

11 The purpose of a temporary restraining order is to preserve the status quo and prevent
 12 irreparable harm pending further court proceedings. *Granny Goose Foods, Inc. v. Bhd. of*
13 Teamsters & Auto Truck Drivers, 415 U.S. 423, 439 (1974). That is all that Zango seeks
 14 here. Zango will have probable success on the merits, and it has already suffered irreparable
 15 injury (and will continue to do so). The balance of hardships tips sharply in Zango's favor.
 16 For the foregoing reasons, this Court should issue a temporary restraining order, and,
 17 ultimately, a preliminary injunction, compelling PC Tools to remove Zango's software
 18 programs from the Spyware Doctor detection database.

1 DATED this 25th day of May, 2007.
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CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for Plaintiff Zango, Inc. herein.

I hereby certify that on May 25, 2007, I electronically filed the attached foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following persons:

J. Ronald Sim
Maren R. Norton
Stoel Rives LLP
600 University Street
Suite 3600
Seattle, WA 98101-3197

and I hereby certify that I have delivered via U.S. Mail the document to the following non CM/ECF participants:

NA

I declare under penalty of perjury under the laws of the State of Washington that
the foregoing is true and correct.

DATED this 26 day of May, 2007, at Seattle, Washington.

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